No. [redacted] 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JIM SKIDMORE, ET AL,
Petitioners

vs.

SWIFT AND COMPANY,
Respondent

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIFE IN SUPPORT THEREOF

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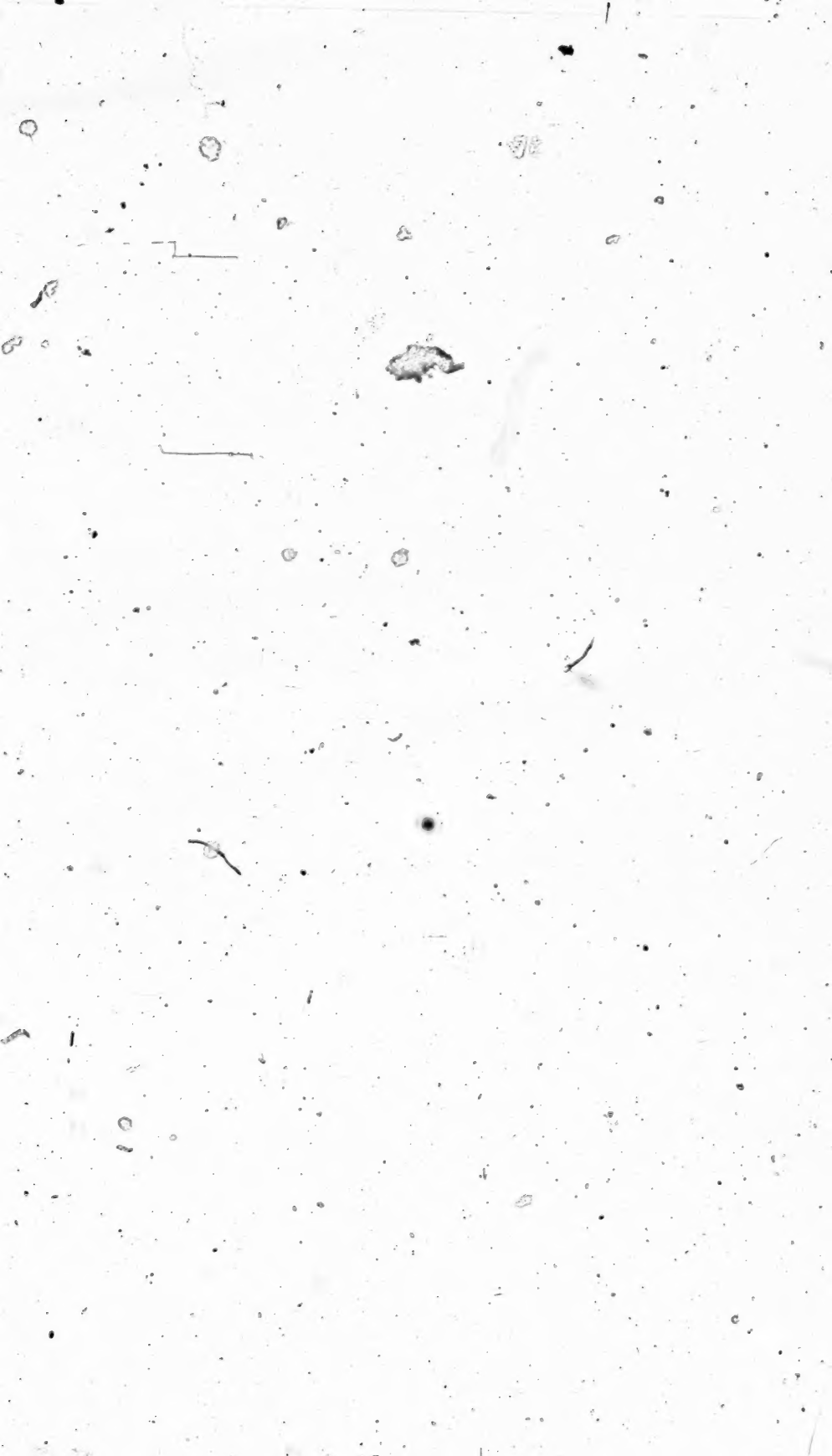

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MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice, and Honorable Associate Justices of the Supreme Court of the United States:

Now come the Petitioners, Jim Skidmore, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis, and Ted Hayes, and move the Court to grant them a rehearing in this cause, and to set aside the order of denial of their petition for a writ of certiorari, and grant such petition, and for cause would respectfully show to the Court:

I.

The Court erred in denying the petition for a writ of of certiorari because the Circuit Court of Appeals for the Fifth Circuit had rendered a decision in this case on an important federal question in conflict with the applicable decisions of the Supreme Court of the United States.

II.

The Court erred in denying the petition for a writ of certiorari from the Circuit Court of Appeals for the Fifth Circuit because the decision of the Circuit Court involves the interpretation of a federal law which has not been, but should be, settled by the Supreme Court of the United States.

III.

Your Petitioners would further show the Court that if the judgment of the Circuit Court is permitted to stand that an important provision of the Fair Labor Standards Act of 1938 is nullified and voided even though the Supreme Court has held all sections of the said Act on which it has ruled to be constitutional.

IV.

Your Petitioners would show the Court that this Motion for Rehearing is filed within the 25 days from date of judgment as required by Rule 33 of the Supreme Court Rules.

Wherefore, your Petitioners respectfully pray this Honorable Court to grant them a rehearing and reconsideration, and respectfully pray that the brief printed with this Motion be filed, and that on further consideration the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel:
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Certificate of Counsel

I, the undersigned, Mack Taylor, attorney and solicitor for the above named Jim Skidmore, et al, Petitioners, do hereby certify that the foregoing petition for rehearing is presented and taken in good faith and not for the purpose of delay.

Mack Taylor

No. 218

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JIM SKIDMORE, ET AL.,
Petitioners
vs.
SWIFT AND COMPANY,
Respondent

BRIEF IN SUPPORT OF MOTION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

I.

Previous Opinions

On October 11, 1943, this Honorable Court ordered that the petition for a writ of certiorari in the subject case be denied, but that Justice Black was of the opinion that certiorari should be granted.

The Circuit Court of Appeals for the Fifth Circuit Circuit rendered judgment on June 1st, 1943, for the Respondent. In its opinion the Circuit Court said, "The Act (*Fair Labor Standards Act of 1938*) does not require payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide

agreements whereby an employee agrees to be available if needed. * * * ." The full opinion of the Circuit Court is set out in the Transcript of the Record, pages 62, 63 and 64.

The District Court for the Northern District of Texas, Fort Worth Division, rendered its judgment August 1, 1942, and in its opinion said, "The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked * * * ." The full opinion of the District Court is set out in the Transcript of the Record, pages 26 to 33.

II.

Brief Summary of Facts

The facts in this case are very simple:

Swift and Company in its packing house in Fort Worth, Texas, employed the seven Petitioners, which employment is admitted to be within the coverage of the Fair Labor Standards Act of 1938. These employees worked in the plant 5 days per week on a regular day-time shift of 8 to 9 hours, so that their day work totaled 44 and later 40 hours per week. This day-time work was consumed in operating elevators and keeping fire-fighting and fire-prevention equipment in good condition. For this day-time work these employees were paid a sum varying from $27 to $29 per week, with overtime pay for additional day-time work at rates of 68 cents per hour (as indicated by Schedule on pages 47 and 56 of Transcript of Record). In addition to this day-time work these employees were "required to remain in or within hailing distance of

the fire hall" 3 to 4½ nights at the plant to answer emergency alarms. (Tr. p. 37.) The employees did not live at the plant, but each "maintained a residence" of his own. (Tr. p. 37.) During these nights these employees had no specific duty except to answer—and at all times be ready to answer an alarm. They could while their hours away as they pleased so long as they stayed on the "job." A typical schedule of each of the plaintiffs is set forth in the Transcript, pages 39-40-41, as follows:

Cases of Jim Skidmore, W. W. Rousey, E. Phennell, R. Roark and Ted Hayes.

Period Oct. 24, 1938 to May 2, 1939 (44 Hour Law in effect)

	Hours
Typical schedule of hours of plaintiffs covering each day of a 7 day week	168
Monday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Supper (time off)	2
5:30 P. M. to Midnight—Fire Hall	6½
Tuesday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Fire Hall	2
Wednesday:	
5:30 P. M. Tuesday to 5:30 P. M. Wednesday—Time off	24
5:30 P. M. to Midnight—Fire Hall	6½

Thursday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Supper (time off)	2
5:30 P. M. to Midnight—Fire Hall	6½
Friday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 3:30 P. M.—Operate elevator or general relief	8
Mid-day lunch period—Time off	½
3:30 P. M. to 5:30 P. M.—Fire Hall	2
5:30 P. M. to Midnight—Time Off	6½
Saturday:	
Midnight to 6:00 A. M.—Fire Hall	6
6:00 A. M. to 7:00 A. M.—Breakfast (time off)	1
7:00 A. M. to 5:00 P. M.—Operate elevator or general relief	9½
Mid-day lunch period—Time off	½
5:00 P. M. to 5:30 P. M.—Fire Hall	½
Sunday:	
5:30 P. M. Saturday to 5:30 P. M. Sunday—Time off	24
5:30 P. M. to Midnight—Fire Hall	6½
	168

Thus these employees spent 102 hours per week in the employer's plant, as required by the employer, but were paid for only 40 to 44 hours, the maximum under the Fair Labor Standards Act.

All of the facts in this case were agreed and stipulated by the parties. (Tr. pp. 36 to 56.).

III.

Argument

Your Petitioners would first ask the Court to take judicial knowledge of the vast application of the question involved in this cause. There are but seven Petitioners, but there are many thousands of employees who are similarly situated, scattered in factories, oil fields, warehouses and in mines and out of the way places throughout the nation. By and large we believe employers have recognized that the Fair Labor Standards Act of 1938, commonly called "The Wage and Hour Law," applies to their employees while they are "on duty", but many of these employers have been looking for loop-holes and weakness in the Act. True, they may be forced by the present emergency and shortage of labor to abide by the strict meaning of the Act and pay the required overtime, but after the emergency the opinion in the "Swift Case" rendered by the Fifth Circuit will become a haven of refuge for all employers who want to keep their employees long hours without payment of overtime. Why should an employer give work to a nightwatchman, when he can simply put a cot in his office and say to one of his regular employees, "You sleep here tonight or I'll fire you," and never need think of paying him? In order to provide for his family, the employee will be forced to say, "Certainly I will sleep here tonight. My wife and children can get along without me." Thus one man is made to do two men's work, one of the things which Congress specifically intended to prevent in the Fair Labor Standards Act of 1938. For a large group of

employees, especially those living within the jurisdiction of the Fifth Circuit, the "Wage and Hour Law" will lose its meaning if this decision is permitted to stand by the Supreme Court.

The Administrator of the Wage and Hour Division filed an Amicus Curiae brief in this case on hearing before the Circuit Court of Appeals, and in discussing the work of the employees, said:

> "From the nature of this job it is apparent that the employees' freedom of action was necessarily restricted during the hours on call. Although each of the appellants maintained a home outside the premises (R. 37), the arrangements regarding fire hall duty precluded them from spending any of the time on call at home. The enforced waiting periods in or close by the fire hall were manifestly of benefit only to appellee. The Division has always taken the position that such waiting periods constitute hours worked for which compensation is due under the Act. A computation of hours worked which excluded all time spent on duty in appellee's fire house would not be accepted by the Division as a 'reasonable' determination."

This expression is borne out by the Interpretative Bulletins issued by the Administrator which were discussed in the original Petitioners' Brief in Support of a Writ of Certiorari.

Your Petitioners relied strongly in their petition on the expressions given by the Supreme Court in cases involving "hours worked or employed" under other Statutes. In *M. K. & T. Ry. Co. v. United States* (231 U. S. 112, 34 S. Ct. 26) and in *Bountiful Brick Co. v.*

Giles (270 U. S. 154) this Court indicated that an employee did not need to be engaged in physical labor to be "employed or working", but that being "on duty" or "present for duty" was more nearly the test of "employment". *Never* has the Supreme Court stated what constitutes "employment" or "hours worked" as those terms are used in the Fair Labor Standards Act of 1938. Surely, since this Act applies to a great sector of United States citizens, it is an important question of federal law on which this Court should rule.

A number of District Courts have found that the term "employ" as used in the Fair Labor Standards Act includes those hours which an employee is required by his employer to spend "on duty" even though not engaged in actual physical or mental labor. These cases —*Fleming v. Rex Oil and Gas Co.* (43 Fed. Sup. 950), *Travis v. Ray* (41 Fed. Sup. 6), *Walling v. Sun Publishing Co.* (47 F. Supp. 180), and *Walling v. Allied Messenger Service* (47 F. Sup. 773), all follow the clear meaning of the Act as relied on by your Petitioners. But the Circuit Court opinion in this case bears precedent over these District Court decisions and will rule, at least within the jurisdiction of the Fifth Circuit. Thus the law may become, and in fact is now, interpreted in one way in certain courts and in an opposite way in other courts, wherefore it becomes that uniformity can be gained only by a ruling of this Honorable Court.

Not only for the benefit of their own case do your Petitioners bring this plea for rehearing, but for the benefit of all those employees and employers who are involved in similar circumstances. Competition is keen

in the business world, and the employer who dares follow the Circuit Court opinion in this case, or who by virtue of living within the jurisdiction of the Fifth Circuit has a right to follow this opinion, will have a means of saving labor costs which his competitor in another jurisdiction would not dare practice.

Wherefore, your Petitioners pray the Court to grant this motion for rehearing and reconsideration, and to finally grant the Petition for a Writ of Certiorari.

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SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1944.

Jim Skidmore, et al., Petitioners, vs. Swift and Company. On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act to recover overtime, liquidated damages, and attorneys' fees, totalling approximately $77,000. The District Court rendered judgment denying this claim wholly, and the Circuit Court of Appeals for the Fifth Circuit affirmed.

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a.m. to 3:30 p.m., with a half hour lunch period, five days a week. They were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire

hall and be ready to respond to alarms. It is stipulated that "they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms." The trial court found the evidentiary facts as stipulated; it made no findings of fact as such as to whether under the arrangement of the parties and the circumstances of this case, which in some respects differ from those of the *Armour* case, the fire hall duty or any part thereof constituted working time. It said, however, as a "conclusion of law" that "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts," and in its opinion observed: "of course we know pursuing such pleasurable occupations or performing such personal chores, does not constitute work." The Circuit Court of Appeals affirmed.

For reasons set forth in the *Armour* case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not, and cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Company*, 317 U. S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem

posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. *Kirschbaum* v. *Walling*, 316 U. S. 517, 523. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for

relaxation and entirely private pursuits." Exclusion of all such hours the Administrator thinks may be justified. In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." "Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer. . . ."

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested, point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and those are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement

by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith. The evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different. Each case must stand on its own facts. But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Reversed.